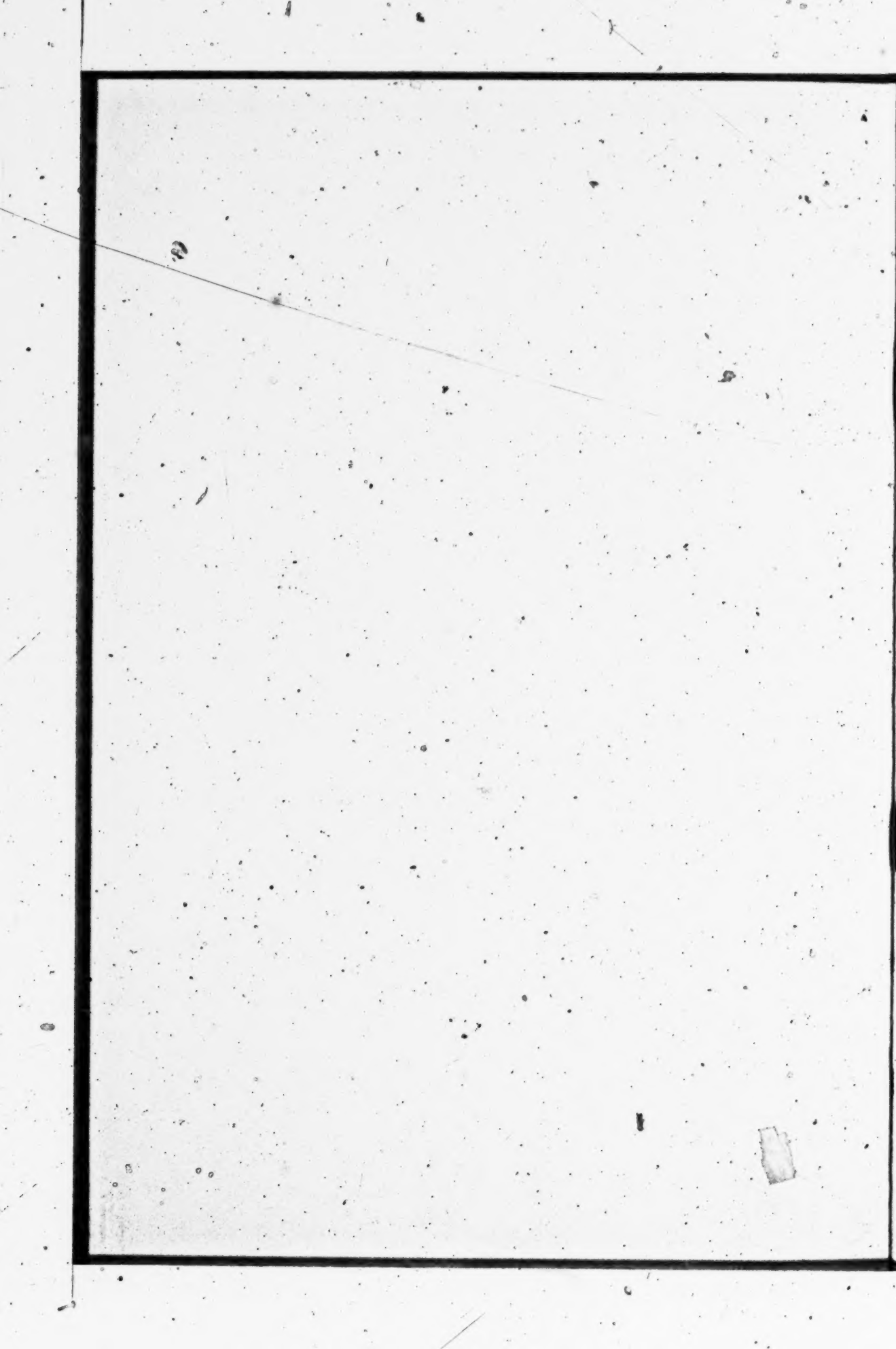

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No. 1178.

IN THE

Supreme Court of the United States

October Term, 1967.

EDWARD FRANZEN,

Petitioner,

v.

THE TOWNSHIP OF ELK, a municipal corporation of the State of New Jersey;

THE TOWNSHIP OF UPPER PITTSGROVE, a municipal corporation of the State of New Jersey;

PHILIP FRANZEN, EMIL W. GALLAGHER and NAOMI A. GALLAGHER, his wife; and JOHN FRANZEN.

REPLY BRIEF OF PETITIONER.

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REPLY.

Respondents argue that decisions of this Court support the constitutionality of an In Rem Tax Foreclosure statute not providing for personal notice. We disagree, and we should like to refer to the dissenting opinion of two of New Jersey's most eminent Jurists in the case of *City of Newark v. Yeskel*, 5 N. J. 313, 74 A. 2d 883 (Supreme Court, 1950). This dissent was written by Mr. Justice Oliphant, formerly the Chancellor of New Jersey, and a member of the Court of Errors and Appeals, and was concurred in by the equally learned Mr. Justice Heher. Wrote Mr. Justice Oliphant,

> "The In Rem Foreclosure Act abolishes the long existing practice of making inquiry to identify the persons in interest for the purpose of serving process. This is a radical departure from the requirements of due process long existing in this state. The argument to support its validity is one of expediency, namely the need for revenue. I do not think an owner's property may be taken away because it is in the public interest that arrears of taxes be collected promptly. It is of the essence of due process that there be notice to the extent that it is appropriate and reasonable. Tax cases are notable exceptions but it does not seem to be sound to insist that no notice need be given where inquiry would disclose resident owners who could be served with process and I have not found any cases in the United States Supreme Court that so hold.
>
> "The respondent relies upon Hagar v. Reclamation District, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569; Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526, 16 S. Ct. 83, 40 L. Ed. 247; Pittsburgh, Cincinnati, C. & St. L. R. Co. v. Backus, Treas., Marion County, Ind., 154 U. S. 421, 14 S. Ct. 1114, 38 L. Ed. 1031; North

Laramie Land Co. v. Hoffman, 268 U. S. 276, 45 S. Ct. 491, 69 L. Ed. 953; Leigh v. Green, 193 U. S. 79, 24 S. Ct. 390, 48 L. Ed. 623.

"The first four cases relate to the right of a taxpayer to notice so that he may review the assessment and levy made under the taxing act. In short these are assessment cases and it can be conceded that a taxpayer is charged with notice of the law under which the assessment, levy and the lien for the taxes is imposed upon his property.

"In the Hagar case there was a sale but the case, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. at page 573 clearly indicates that personal notice is required to be given to the taxpayer prior to the sale. These cases are clearly distinguishable from the questions on notice here presented."

Mr. Justice Oliphant adverted to the fact that, in *Leigh v. Green*, supra, the Court—

"pointed out that the term 'owner' as used in the 4th section of the act applies only to the owner of the fee and did not include a person holding a lien on the premises. It is clear from a reading of this opinion that the statute and proceeding in question only applied to unknown owners of the fee and thus is equally consistent with what has long been the provision of our tax statute relating to the foreclosure of the rights of 'unknown' owners.

"I have some difficulty in reconciling the United States Supreme Court cases relied on by the majority, and the recent decision of that court in Mullane v. Central Hanover Bank & Trust Co., supra. I do not think that Anderson Nat. Bank v. Luckett, 321 U. S. 233, 64 S. Ct. 599, 88 L. Ed. 692, 151 A. L. R. 824; Security Savings Bank v. California, 263 U. S. 282, 44

S. Ct. 108, 68 L. Ed. 301, 31 A. L. R. 391, are applicable because those cases proceeded on the theory that the owner of the intangible property was not completely deprived of it. In those cases the owners were unknown and could not be found and personal service could not be made.

"True the legislature has the sole power to establish the methods for the levy and collection of taxes. It is one thing to assess, levy, and to impress a lien for taxes on the property; it is a wholly different thing to deprive a person of a right of property for failure to pay his taxes. If the legislature can do it for four years as to 'general land taxes', it can do it for one year's taxes.

"The exercise of the taxing power is a severe exercise of the power of absolute sovereignty on behalf of the State and to divest ownership without personal notice and without direct compensation out of the excess value is the instance where constitutional government approaches most nearly to an unrestrained tyranny. Redemption is the last chance of a citizen to recover his property. Cooley on Taxation (4th Ed.) sec. 1562, 1567, 1568."

The petitioner respectfully submits that in these days of complexities, in business and in every other path of life, personal notice is more essential than ever, whenever such notice can be given.

Respectfully submitted,

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Attorneys for the Petitioner.